ROBERT CHEAH FOONG CHIEW

v.

LEMBAGA JURUTERA MALAYSIA

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
SURIYADI HALIM OMAR JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: W-02-6-2005]
4 AUGUST 2008

PROFESSIONS: *Engineers - Improper conduct - Application by engineer to declare charges by Board of Engineers bad in law before start of disciplinary hearing - Whether application premature - Whether application involved public law rights - Whether application should proceed by way of judicial review rather than by declarations - Whether abuse of court's process*

The appellant was a professional engineer registered under the Registration of Engineers Act 1967 ('the Act'). The respondent, the Board of Engineers Malaysia, commenced disciplinary proceedings against the appellant upon complaints received on a project in which he was in charge of. The appellant was charged for contravening s. 25 Part IV (Code of Professional Conduct) of the Registration of Engineers Rules 1972. Before the disciplinary proceedings could commence, the appellant applied to the High Court for a declaration that since the alleged contravention took place before January 1987, no disciplinary action could be taken against him by virtue of s. 15 of the Act. The appellant also requested for a prohibitive injunction to restrain the respondent from investigating him on the complaints lodged against him. The High Court dismissed the application and on appeal, the Court of Appeal affirmed the High Court decision. The appellant sought leave to appeal to the Federal Court but before the appeal could be heard, the appellant withdrew his appeal on the understanding that the respondent would withdraw the charge against him. However, the respondent did not withdraw the charge but instead revised the original charge. The appellant raised a preliminary objection with the respondent that was subsequently dismissed by the respondent. Before the respondent could proceed further with the disciplinary hearing, the appellant applied by way of originating

summons ('OS') to the High Court for declarations, namely, that the revised charge against him was *ultra vires* the Act and bad in law. The High Court struck out the OS under O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC') upon an application by the respondent. Hence, the appellant's appeal to the Court of Appeal.

Held (dismissing the appeal)
Per James Foong JCA delivering the judgment of the court:

(1) The High Court applied the correct principle of law as set out in *O'Reilly v. Mackman* and as adopted in *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor*. The prayers sought by the appellant involved principally and primarily public law rights rather than private law rights. The correct approach should be by way of judicial review under O. 53 RHC rather than by way of originating summons. (paras 14 & 15)

(2) The High Court was right in holding that the appellant's application was premature as it would restrain the respondent from exercising its statutory duties under s. 15(1) and (2) of the Act. (para 17)

(3) The appellant was abusing the process of the court in attempting to delay the start of the disciplinary hearing against him. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah seorang jurutera profesional yang didaftarkan di bawah Akta Pendaftaran Jurutera 1967 ('Akta'). Responden, Lembaga Jurutera Malaysia, telah memulakan prosiding disiplin terhadap perayu ekoran aduan mengenai satu projek yang dikawalselia oleh beliau. Perayu dituduh kerana melanggar s. 25 Bahagian IV (Kod Perilaku Profesional) Kaedah-Kaedah Pendaftaran Jurutera 1972. Bagaimanapun, sebelum prosiding disiplin bermula, perayu memohon ke Mahkamah Tinggi untuk deklarasi bahawa oleh kerana pelanggaran disiplin yang didakwakan itu berlaku sebelum Januari 1987, maka tiada tindakan boleh diambil terhadapnya berdasarkan s. 15 Akta. Perayu juga memohon injunksi prohibitif bagi melarang responden dari menyiasat beliau atas aduan berkenaan. Mahkamah Tinggi menolak permohonan dan atas rayuan keputusan tersebut disahkan oleh Mahkamah Rayuan. Berikutnya, perayu memohon izin untuk merayu ke

Mahkamah Persekutuan, namun sebelum rayuan didengar, telah menarik balik rayuan atas kefahaman bahawa responden akan menarik balik pertuduhan terhadapnya. Responden bagaimanapun tidak menarik balik, sebaliknya hanya menyemak pertuduhan asal. Perayu membangkitkan bantahan awal dengan responden tetapi bantahan ditolak oleh responden. Walau apapun, sebelum responden dapat meneruskan dengan prosiding disiplin, perayu telah memfail saman pemula ('SP') di Mahkamah Tinggi memohon deklarasi bahawa pertuduhan yang disemak tersebut *ultra vires* Akta dan tak sah di sisi undang-undang. Atas permohonan responden Mahkamah Tinggi membatalkan SP di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Kini perayu merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan)

Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi telah menggunapakai prinsip yang betul seperti yang dibentang dalam *O'Reilly v. Mackman* dan diterimapakai oleh *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor*. Apa yang dipohon perayu secara utamanya melibatkan hak-hak undang-undang awam. Oleh itu, pendekatan yang betul adalah melalui semakan kehakiman di bawah A. 53 KMT dan tidak melalui saman pemula.

(2) Mahkamah Tinggi betul dalam mendapati bahawa permohonan perayu adalah pramatang kerana ia akan menghalang responden dari melaksanakan tanggungjawab statutorinya di bawah s. 15(1) dan (2) Akta.

(3) Perayu cuba melambatkan pendengaran disiplin terhadapnya dan kerana itu telah menyalahguna proses mahkamah.

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor [2007] 3 CLJ 377 CA ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Roy v. Kensington And Chelsea And Westminster Family Practitioner Committee [1992] 2 WLR 239 ***(refd)***

Wandsworth London Borough Council v. Winder [1985] 1 AC 461 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5, 8
Registration of Engineers Act 1967, ss. 7(a), 15(1)(g), (2), 26
Registration of Engineers Rules 1972, s. 25 Part IV
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d), O. 53

For the appellant - Dato' Dominic Puthucheary (Firoz Hussein & Cheng Mai with him); M/s Puthucheary Firoz & Mai
For the respondent - Chu Ai Li (Leong Yin Wei with her); M/s Azman Davidson & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R1-24-20-2004]

Reported by Usha Thiagarajah

JUDGMENT

James Foong JCA:

Background

[1] We shall begin by disclosing the background leading to this appeal. The appellant is a professional engineer registered under the provisions of the Registration of Engineers Act 1967 (the Act). He practiced as an engineer in a company known as Sigoh Din Sdn Bhd. This company is or was a body corporate of consulting engineers approved to practice as such by the Act.

[2] Sigoh Din Sdn Bhd was awarded a contract by the Ministry of Defence of Malaysia (Mindef) to construct and complete an ammunition depot in Malacca. Aside from being a director of this company, the appellant was also the consultant engineer in charge of this project. Due to some complaints by Mindef, the Lembaga Jurutera Malaysia (the respondent) commenced disciplinary proceedings against the appellant. The appellant was charged for contravening s. 25 of Part IV (Code of Professional Conduct) of the Registration of Engineers Rules 1972 (the Rules) which was made under s. 26 of the Act.

[3] Before the disciplinary proceedings could commence, the appellant applied to the High Court for a declaration that since the alleged contravention took place before January 1987, no disciplinary action can be taken against him by virtue of s. 15 of

the Act. Aside from this, he also requested for a prohibitive injunction to restrain the respondent from investigating him on the complaints filed by Mindef. A

[4] On 18 July 1996, the High Court dismissed his application. He appealed to the Court of Appeal but the Court of Appeal affirmed the decision of the High Court. Dissatisfied, he sought leave from the Federal Court to appeal. The Federal Court granted him leave but before the appeal could be heard, the appellant withdrew his appeal. According to the appellant, the appeal was withdrawn on the understanding that the respondent would withdraw the charge against him. B C

[5] The respondent did not withdraw the charge against him but instead revised the original charge to the following:

> That you, Cheah Foong Chiew, while a director of Sigoh Din Sdn Bhd ("the company") which undertook to supervise the construction of an ammunition depot project at Masjid Tanah, Malacca ("the project") for the Government of Malaysia did between 1981 and 1983 fail to uphold the dignity, standing and reputation of the engineering profession by your failure as the director of the company in charge of the project to exercise control in a professional manner over the company's resident staff engaged in supervising the project and you have thereby contravened Rule 25 of the Registration of Engineers Rules 1972 punishable under section 15(1)(g) of the Registration of Engineers Act 1967. D E F

[6] When the appellant became aware of this, he raised a preliminary objection with the respondent. This involved the following issues:

1. Whether the respondent has the jurisdiction to maintain the revised charge in view that between 1981 to 1983, s. 15(1)(g) of the Act did not include r. 25 of the Rules and that this rule was only included as part of s. 15(1)(g) of the Act in 1987; G H
2. Whether the respondent has the right to charge the appellant under s. 15(1)(g) of the Act as a director of Sigoh Sdn Bhd in view of s. 7(a) of the Act.

[7] The hearing of these preliminary issues was fixed for hearing on 7 July 2001. However, at the request of the appellant, who cited that he was not medically fit to attend the hearing, it was postponed. The appellant then suggested that instead of an oral I

hearing to determine these preliminary issues, written submissions be permitted. This was acceded to, and on 25 July 2001 the appellant duly handed in his written submission to the respondent.

[8] On 28 January 2002, the respondent dismissed the appellant's preliminary objection.

[9] Before the respondent could proceed further with the disciplinary hearing, the appellant on 23 April 2004 applied to the High Court by way of originating summons for the following:

1. A declaration that the revised charge against him is *ultra vires* of the Act.

2. Alternatively, a declaration that the revised charge is ambiguous and bad in law.

3. A declaration that the respondent's letter of 28 January 2002 (mistakenly dated 28 January 2001) is contrary to natural justice and/or infringes the appellant's rights under the Federal Constitution to procedural fairness including but not limited to arts. 5 and 8.

4. A declaration that the disciplinary procedures adopted by the respondent against him are contrary to natural justice and/or infringes the appellant's rights under the Federal Constitution to procedural fairness including but not limited to arts. 5 and 8.

5. A declaration that the said disciplinary procedures are biased and constitute an infringement of the appellant's rights under arts. 5 and 8 of the Federal Constitution.

6. A declaration that the respondent had acted contrary to the rules of natural justice in determining that it has established a *prima facie* case against the appellant without giving him an opportunity to be heard.

7. A declaration that the respondent had acted *ultra vires* of the Act and exceeded its jurisdiction conferred under the Act in purporting to revise the original charge *vide* its letter of 28 February 2001.

8. A decimation that the revised charge is bad on grounds of *mala fides* and/or stale in law.

9. An order that the revised charge be set aside.

10. An injunction to prohibit the respondent and/or its servants and/or its agents from commencing or conducting hearing against the respondent on the revised charge.

Application To Strike Out

[10] In response to this, the respondent filed an application (encl. 12) to strike out this originating summons of the appellant on the grounds that it is an abuse of the court's process.

Decision Of The High Court

[11] The High Court allowed this application and struck out the appellant's originating summons under O. 18 r. 19(1)(b), (c) and (d) of the Rules of High Court (RHC).

[12] The reasons proffered by the High Court are these:

(i) What the appellant is seeking in the originating summons is to judicially review the acts and decisions of the respondent in exercise of its statutory powers. This is a public law remedy. As such, the appellant should proceed by way of judicial review rather than by an originating summons for a declaration and injunction.

(ii) That this approach may have been adopted by the appellant to evade the necessity to obtain leave from court to file such application; a requirement for judicial review under O. 53 RHC. Leave would most likely to be refused because: (a) the appellant is out of time in filing such application and; (b) the appellant is not the person adversely affected by the decision of the respondent since: (i) no decision was considered made under s. 15(1) of the Act and; (ii) the interlocutory decision of the respondent has not adversely affected the appellant.

(iii) The appellant's originating summons is premature since the respondent has not made any order to cancel the appellant's registration as an engineer under s. 15(1) of the Act. In fact, this application of the appellant for an injunction "would in effect pre-empt or hinder the respondent's right to exercise its statutory duties and powers under s. 15(1) and s. 15(2) of the Act".

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Court Of Appeal's Decision & Reasons

[13] After hearing arguments, we upheld the decision of the High Court and dismissed the appellant's appeal with costs. Our reasons are these:

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[14] First, we are of the view that the High Court in deliberating the application has applied the correct principle of law as set out in *O'Reilly v. Mackman* [1983] 2 AC 237 (and adopted by our courts in *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377 @ 397) which is:

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> ... it would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

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[15] Secondly, we find that in substance and in fact what the appellant is requesting in his originating summons involves principally and primarily public law rights rather than private law rights.

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[16] Thirdly, though we are conscious of the English House of Lords decisions in *Wandsworth London Borough Council v. Winder* [1985] 1 AC 461 and *Roy v. Kensington And Chelsea And Westminster Family Practitioner Committee* [1992] 2 WLR 239 which says:

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> .. where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

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we are of the view that the prayers sought by the appellant involve principally and primarily public law rights rather than private law rights. When they overwhelmingly concern public law rights, then the correct approach should be by way of judicial review under O. 53 RHC rather than by way of originating summons.

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[17] Finally, we are of the opinion that the High Court is right in holding that the appellant's application is premature as it would restrain the respondent from exercising its statutory duties.

[18] In conclusion, it is our opinion that from the facts of this case the appellant is abusing the process of the court in attempting to delay the start of the disciplinary hearing against him. Such abuse should cease. It has certainly gone on for far too long.